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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLANT'S REPLY TO MOTION TO AFFIRM

W. F. WILLIAMSON,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 428

EL DORADO OIL WORKS AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GREAT AMERICAN TRANSPORTATION CORPORATION, ET AL.

APPELLANTS' REPLY TO APPELLEES' BRIEF ON MOTION FOR AFFIRMANCE OF DECREE OF THE DISTRICT COURT.

Appellants instituted this action under the Urgent Deficiencies Act to annul and set aside an order of the Interstate Commerce Commission dated April 10, 1944, on the grounds that the Commission had no constitutional power to proceed as it did; that it exceeded its statutory authority and did not comply with the applicable statute, and finally, that its findings were not supported by the basic prerequisites of proof and, in fact, there was no evidence whatever to support those findings. These grounds are fully covered by the Statement as to Jurisdiction heretofore filed.

Counsel for Appellees concede that this appeal "presents a somewhat novel jurisdictional question" but they claim that the opinion of the Three Judge Court is correct and that its decree, from which this appeal was taken, should be affirmed without argument. In their argument they quote from the opinion of the Three Judge Court the statement that the Commission was not required in the proceeding before it to make any order, and in fact, made none and therefore there was no order for review by that court. They also argue that the Supreme Court in its disposition of the appeal that inspired the investigation proceeding before the Interstate Commerce Commission, had directed the Commission to investigate and decide a question or questions of administrative character for the guidance of the District Court, in which the original action in assumpsit is pending, and that the order of the Commission was ancillary to the assumpsit action and advisory to the District Court.

Appellants challenge both of these contentions. But in any view it is very clear that both cannot be correct. If the Commission made no order, it failed to perform its duty under Section 15 (13) of the Interstate Commerce Act and at the same time failed to follow the directive of the Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. If on the other hand the Commission passed upon the issues before the District Court in the original assumpsit action, either judicially or in an advisory capacity, it usurped the jurisdiction of that court. In so doing, it exceeded the administrative authority vested in it by Section 15 (13) of the Interstate Commerce Act and acted without authority under the Constitution.

Although the Supreme Court in deciding *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, *supra*, directed the District Court before which the original assumpsit action was pending to stay its hand until a deter-

mination was made by the Interstate Commerce Commission of the administrative question involved in the application of Section 15 (13) of the Interstate Commerce Act, the court did not define with particularity the administrative question reserved for decision by the Commission. Nor did it commit to the Commission the decision of judicial or non-administrative questions or broaden the authority of the Commission as expressed in the cited section. In the generalities of their argument, opposing counsel have lost sight of or disregarded the essential features of the controversy before the Commission and the questions involved. Whether those questions arose from the petition for investigation filed by the Appellants, or from the direction of the Supreme Court, or on the initiative of the Commission, the authority of the Commission in the matter of the allowance to be made to shippers or other furnishers of facilities to the carriers is embodied in Section 15 (13) of the Interstate Commerce Act. The Commission is required either upon application or on its own initiative to determine after investigation what is a just and reasonable allowance to be made by carriers to shippers or others furnishing facilities or services to the carriers which compensation must be just and reasonable, uniform as to all who furnish the services and embodied in the approved and published tariffs of the carriers. Counsel for Appellees and the Commission itself have considered the decision of the Supreme Court as a direction to the Commission to assist the District Court in deciding the issues there pending, and in fact to decide the legal questions involved in that case. In advancing this argument, counsel for Appellees have overlooked the fact that there was but one question at issue in the original assumpsit action. The Tank Car Corporation, the defendant there, admitted the car lease contract, made no question of its legality and also admitted the receipt and reten-

tion of the mileage paid by the carriers for the transportation of the tank cars in question. Its only defense was that a payment of the mileage allowance to the shipper, who furnished the cars to the carriers, would work a rebate or discrimination prohibited by the Elkins Act. The Supreme Court upheld the contract as legal in itself and recognized the validity of the tariff provisions for the payment of mileage of one and one-half cents per mile for car movements, and held that the Oil Works, Appellant here, had furnished the cars and was therefore entitled under the "plain provisions of Section 15 (13)" to receive the stated mileage allowance, but that as the published tariffs specified that the allowances would be paid only to the person whose recording marks were on the cars, and for a portion of the time, that they would not be paid to a lessee, the Oil Works, being a lessee and not having its recording marks upon the cars, was not entitled under the tariffs, as then in effect, to demand the mileage allowances from the carriers. At the same time said the Court the provisions of Section 15 (13), *supra*, must control the attempted limitations imposed by the carriers, and that the shipper could, as it had not then done, apply to the Interstate Commerce Commission for relief from these limitations. Referring then to the contention of the car corporation that the rental paid by the Oil Works as lessee shipper was substantially less than the mileage earned by the movements of the leased cars and therefore resulted in a profit to the shipper, the court observed that this was a question within the competence of the Commission. On the same subject, the court clearly indicated that there was no legal inhibition against making a profit and held that the Commission "is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and pre-

scribe a uniform rate which will reflect such experience". *General American Tank Car Corp.* v. *El Dorado, supra*, page 430.

Section 15 (13) *supra*, is the yardstick by which the authority of the Commission must be measured and its action governed. Petitioners could not broaden or narrow that authority, nor would the Supreme Court assume by its decision to either enlarge or reduce the authority and the duty of the Commission as expressed in the statute.

Under the decisions of the Supreme Court, the jurisdiction of a Three Judge Court constituted under the Urgent Deficiencies Act turns upon the questions before the Interstate Commerce Commission and also upon the character of the decision and order given upon those questions. In an action where the lines are as closely drawn as they are in the instant case, a clinical study of those questions would seem to be proper, if not necessary, even at the risk of some repetition of the subject matter of Appellants' Statement as to Jurisdiction.

Since the Supreme Court in its decision of *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra*, recognized the validity of the car leasing agreement, the acceptance by the carriers of tank cars and other facilities furnished by shippers and the payment of a mileage allowance of one and one-half cents per mile for that service; and that the shipper, Appellant here, had furnished the cars and was entitled under the provisions of Section 15 (13) of the Interstate Commerce Act to receive that compensation except for the limitation imposed by the carriers' tariffs that such payments would be made only to the registered owner and not to the lessee of the cars, the administrative questions requiring determination by the Commission were the following: First, what would be a just and reasonable compensation to be allowed in the future uniformly to all

furnishers of tank cars as a class in the light of the facts to be disclosed upon the investigation as to the cost and possible profits accruing to a shipper. Second, whether the carriers may properly stipulate in their published tariffs covering these allowances that payments would not be made to a shipper lessee notwithstanding the provisions of Section 15 (13) of the Commerce Act that such compensation should be paid to the furnishers of the cars or other facilities utilized in the transportation. The court did not intend to take the assumpsit case out of the hands of the District Court which was held to have jurisdiction. (*General American Tank Car Corp.* v. *El Dorado Terminal Co.*, page 428.) Nor did it intend that the Commission should investigate the factual conditions in previous years to determine whether the Oil Works as shipper lessee had made a profit in the past on leasing the tank cars, or whether the Tank Car Corporation should be relieved from performing its obligations as an agent or otherwise under the car leasing contract. Whether there had been a violation of the Elkins Act in the past was a question for the District Court to determine under the issues in the assumpsit action. It was not an administrative question committed to the decision of the Commission under the provisions of Section 15 (13) of the Commerce Act or the previous decisions of the Supreme Court. As to the future on the other hand, it was the province of the Commission after full investigation to determine what in the light of all the facts was a just and reasonable allowance to be made uniformly to the furnishers of tank cars as a class as compensation for that service and what, if any, direction should be given to the carriers with respect to their published stipulation that mileage payments would not be made to shipper lessees who furnished the cars. It would seem entirely clear that these were the administrative questions which the Supreme Court designed that the Commission would determine.

The Report and Order of the Commission

The report and order entered by the Commission on April 10, 1944, and which were the subject of challenge in the present action, not only failed to determine the administrative questions hereinbefore stated but assumed in excess of the constitutional authority of the Commission and of the special authority vested in it by Section 15 (13) of the Commerce Act to decide the civil action in assumpsit pending before the District Court. The Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, *supra*, held that the District Court had jurisdiction of that assumpsit action.

Counsel for Appellees have quoted in their brief certain findings from the report of the Commission. The quoted findings that an allowance by the carriers or the Tank Car Corporation in excess of the car rental would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper, and that the amount paid by the Tank Car Corporation prior to July 1, 1934, under the terms of the car lease agreement, was to the extent that it exceeded the rentals, unjust and unreasonable and unduly preferred the Oil Works, were not supported by any evidence and in fact were directly contrary to all of the evidence upon that subject. The further finding that the Oil Works is entitled to no allowance from the carriers directly or through the Tank Car Corporation for the special cleaning and preparation of the tank cars was not, as to the carriers, a question before the Commission since the shipper (Appellants) expressly disavowed such a claim. As to the Tank Car Corporation, the question was also not involved. It could only be relevant in an investigation by the Commission as to the proper allowance to be paid by the carriers to the furnishers of tank cars as a class. That feature the Commission expressly by-passed although it was the important question

committed to it under the provisions of Section 15 (13) of the Interstate Commerce Act. The Commission finally ordered a discontinuance or dismissal of the proceeding before it.

Appellants instituted the present action under the Urgent Deficiencies Act to secure from the Three Judge Court a decree annulling and setting aside the above mentioned report and order. Counsel for Appellees admit that the case comes within the letter of the statute but they assert that the order was not reviewable under the Urgent Deficiencies Act and that is the basis of their motion to affirm.

Unless the administrative action falls within one of the excepted classes, it is subject to some form of judicial review if the other requisites for judicial action are met. The courts have on many occasions considered the reviewability of orders by administrative bodies and held that proprietary or legislative actions, or orders of a preliminary or procedural character are not reviewable. Counsel for Appellees do not contend that the order under attack may be properly assigned to either of these non-reviewable classes. Their argument is directed to support the decision of the District Court that the Commission made no decision requiring any party to the proceeding before it to do or not to do any specific act; that the Commission merely followed the directions of the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, *supra*, and having done so discontinued the proceeding with the result that there was no order for review under the statute. The court noted four decisions to which we shall later refer.

We cite the following decisions of the Supreme Court holding such orders reviewable under the Urgent Deficiencies Act as against the jurisdictional challenge urged by counsel for the Appellees here.

Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125, wherein the court analyzed the question of reviewability under the

Urgent Deficiencies Act and all of the decisions of the Supreme Court where that question was considered. The *Rochester* case pointed the rules for the decision of all the cases that have since come before the court involving this question.

Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156, wherein the same court held that an order by the Federal Power Commission denying an application was reviewable, and presented "a case or controversy" within the constitutional requirements pertaining to Federal jurisdiction.

In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, the court held that in determining whether an administrative order is subject to judicial review, it is immaterial that the order does not itself command action since administrative determinations which are not commands may for all practical purposes determine rights as effectually as the judgment of a court, and may be examined by courts under particular statutes providing for the review of "orders." The Interstate Commerce Act definitely provides for a review by a Three Judge District Court of orders of the Interstate Commerce Commission.

Mitchell v. *United States*, 313 U. S. 80. In that case the Supreme Court speaking through Mr. Chief Justice Hughes held that the negative form of an order of the Interstate Commerce Commission dismissing a complaint alleging discrimination does not foreclose the right of review whether or not further proceedings are to be had.

Columbia Broadcasting System v. *U. S.*, 316 U. S. 407. The proceeding was taken under the Urgent Deficiencies Act against an order of the Federal Communication Commission. The court inter alia held that the particular label placed by the Commission upon a matter decided by it is not conclusive on the question whether such matter is in the form of an order subject to review by the court, and if an

administrative order has the effect of penalizing or injuring a party; it is reviewable. An excerpt from the opinion of Mr. Chief Justice Stone in that case is peculiarly applicable.[1]

United States v. *New River*, 265 U. S. 533 (Page 540).

Alton Railroad Co. v. *U. S.*, 287 U. S. 299, definitely held that an order of the Interstate Commerce Commission which denies relief in part or which dismisses the proceeding may be reviewed, and that such action constitutes an "order" within the provisions of the Urgent Deficiencies Act.

Referring to the case of *United States* v. *Griffin*, 303 U. S. 226, and to the three other cases cited in the opinion of the Lower Court, counsel for Appellees assert that none of these four cases was overruled by the decision in *Rochester Telephone Corp.* v. *United States, supra.* In his analysis of all of the cases involving the reviewability of orders of the Interstate Commerce Commission, Mr. Justice Frankfurter referred to *United States* v. *Griffin* with the observation that that decision was based upon the ruling announced in *Procter & Gamble Co.* v. *U. S.*, 225 U. S. 282, but he expressly overruled that case. This effectively disposed of *United States* v. *Griffin* as authority.

The other three cases relied upon by the District Court are clearly distinguishable from the present:

In *United States* v. *Illinois Cent. R. Co.*, 244 U. S. 82, the court held that an order of the Commission fixing a future

[1] The purposes sought to be accomplished by Sec. 402(a) and the Urgent Deficiencies Act would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in Powell v. United States 300 U. S. 276, 81 L. ed. 643, 57 S. Ct. 470, supra; cf. American Federation of Labor v. National Labor Relations Bd. supra (308 U. S. 408, 84 L. ed. 351, 60 S. Ct. 300).

day and place for the hearing of complaints by certain coal companies growing out of the failure of carriers to furnish coal-cars upon demand, was not an "order" for review by a Three Judge Court within the meaning of the statute because the order merely served as a continuance of the hearing. As authority for its ruling, the court cited *Procter & Gamble Co.* v. *United States*, *supra*.

Delaware & Hudson R. Co. v. *United States*, 266 U. S. 438, determined that a tentative valuation of railroad property by the Interstate Commerce Commission was no more than an ex parte appraisal and that an action does not lie under the statute to annul such valuation.

United States v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, again involved a determination by the Interstate Commerce Commission as to the value of the property of a railroad carrier. The suit was instituted under 19a j of the Interstate Commerce Act to set aside an order of the Interstate Commerce Commission valuing the property of the railroad carrier. The Supreme Court held that the District Court in which the action was filed may stay the proceeding and permit the Commission to amend its order upon further consideration of the evidence, but that injunction did not lie against the order of the Commission simply because the report may injure the credit of the railroad with the public or because it may become the basis of subsequent rate making proceedings. The Urgent Deficiencies Act or proceedings under it was not involved.

In further support of the action of the District Court, counsel for Appellees also cite *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, and *Chicago & Northwestern Railway Co.* v. *United States*, ID 718. The first of the cited cases was before the Supreme Court on writ of certiorari to the United States Court of Appeals for the District of Columbia to review a judgment affirming a judgment of the District Court which sustained a determination

by the National Mediation Board under the Railway Labor Act as to the proper participants in an election of a collective bargaining representative. It was held that the District Court has not authority to review the action of the National Mediation Board in large part because the act under consideration gave to the complainants a precise and different remedy. The cited case did not involve the authority of a Three Judge Court constituted under the Urgent Deficiencies Act. The reviewability of an order of the Interstate Commerce Commission under the act of October 22, 1913, c. 32 (28 U. S. C. 41 Subd. (28 43-45)) was in no manner involved.

The memorandum opinion in *Chicago & Northwestern Railway Co.* v. *United States*, 320 U. S. 718, which is also cited by counsel for the Appellees, does not touch the question before the court in the present case at any point. In a bankruptcy proceeding involving the railroad, the Interstate Commerce Commission had entered an order as to the railroad organization which was subsequently confirmed by the District Court. The memorandum opinion merely held that an appeal from such order of the Interstate Commerce Commission lies only to a District Court of one judge sitting in the bankruptcy proceeding and not to a District Court of three judges assembled under the Urgent Deficiencies Act.

Although counsel for Appellees concede that the "negative order doctrine" is no longer effective, their contention which we have considered in the foregoing pages that the Commission's order of April 10, 1944, did not command anything to be done by any party and merely dismissed the proceeding or was not an order at all, is merely an attempted invocation of the "negative order doctrine" and is answered by the decisions of the Supreme Court in

Rochester Telephone Corp. v. United States, 307 U. S. 125, and *Mitchell v. United States*, 313 U. S. 80.

In further support of the motion to affirm, counsel for the Appellees urge that the action of the Commission here involved "was merely an ancillary step in the pending action of assumpsit brought by the shipper against the car company" and that the commission in its decision "was simply facilitating the conduct of the assumpsit action by performing a task referred to it in the course of the pending law suit." We have in the earlier pages of this brief shown, we believe, that the Supreme Court in deciding *General American Tank Car Corp. v. El Dorado Terminal Co., supra*, did not confer upon the Interstate Commerce Commission any authority to decide the assumpsit action pending in the District Court, nor did it command or authorize the Commission to take any "ancillary" step (to use counsels' term) in the pending action, or to aid the District Court in determining any of the issues in the assumpsit action.

To support their contention that the Commission's report and order was quasi judicial and mere findings, counsel for Appellees cite *United States v. Atlanta*, *United States v. Griffin* and *United States v. Illinois Cent. R. Co.*, which we have heretofore discussed. They also cite *Shannahan v. United States*, 303 U. S. 596 and *Shields v. Utah Idaho R. Co.*, 305 U. S. 177. Those cases do not support the contention of opposing counsel. In the *Shannahan* case a Three Judge Court had dismissed a suit to set aside the decision of the Interstate Commerce Commission as to the applicability to a certain electric railway of the exemption provisions of the Railway Labor Act. The act contained a provision excepting from its effect interurban electric railways not a part of a general steam-railroad system, and directed the Interstate Commerce Commission upon request of the Mediation Board, or upon complaint, to determine

whether an electric line fell within the terms of the exemption. In affirming the decision of the Lower Court dismissing the action, the Supreme Court held (page 599) that under the terms of the act "the function of the Commission was limited to the determination of a fact. Its decision was not in the form of an order and had no characteristic of an order either affirmative or negative". The court further held that the act of the Commission was merely intermediate or preparatory.

Shields v. *Utah Idaho R. Co.*, *supra*, was an action instituted before a One Judge District Court to enjoin the United States Attorney from prosecuting the complainant railroad and its officers for violation of the provisions of the Railway Labor Act. Acting under that act as in the *Shannahan* case the Commission had determined as a fact that the electric railway was subject to the provisions of the statute. The District Court was not asked to review, nor did it review, the order of the Commission. The question before that court was whether the Commission's order determining that the electric railway was subject to the provisions of the Railway Labor Act was binding upon the railway company in its relations with its employees. There was no attack upon the determination of the Commission. Nor is the case authority for the further contention of opposing counsel that the One Judge District Court before whom the original assumpsit action is pending has authority to annul, set aside or review the order of the Interstate Commerce Commission. That authority is committed solely to a Three Judge District Court constituted as provided in the Urgent Deficiencies Act.

In an effort to escape the effect of the decision in *Rochester Telephone Corp.* v. *United States*, *supra*, counsel for Appellees urge that the case was concerned only with the negative order doctrine and expressly distinguished

such cases as *United States* v. *Illinois Cent. R. Co.*, *United States* v. *Los Angeles & S. L. R. Co.*, and *Shannahan* v. *United States*, previously cited by Appellees and considered in the earlier pages of this brief. While it is true that the decision in the *Rochester* case was devoted particularly to the negative order doctrine, Mr. Justice Frankfurter made an exhaustive analysis of reviewable and non-reviewable orders and in the course of that analysis cited the cases above mentioned as illustrating negative and non-reviewable orders. But that pronouncement cannot serve the purpose of opposing counsel or classify the order under present attack either as negative or non-reviewable. Even while the "negative order doctrine" as announced in *Procter & Gamble Co.* v. *United States* was in favor an administrative order unsupported by evidence or made without hearing or in excess of constitutional limits or for some other reason amounted to an abuse of power was held to be reviewable by the courts. (*Manufacturers Railway Co.* v. *United States*, 247 U. S. 457.)

Counsel for Appellees attempt to justify the order of the Commission under attack on the claim that the Commission's findings were directed to the prevention of the payment of excess compensation to a shipper and the accomplishment of an illegal rebate by such action. On the present motion, we are not concerned with the Commission's intention except as reflected by its findings and order and as to those the question is whether the action of the Commission was reviewable under the plain terms of the statute. Prevention of the payment of excess compensation was a matter within the jurisdiction of the Commission to be disposed of by an order applicable to the future. The assumpsit action pending in the District Court involved only the right of the shipper lessee to collect from the Tank Car Corporation, as provided in the lease agreement, the mileage previ-

ously collected from the carriers for the use of tank cars furnished by the shipper during the years 1934 and 1935. The Tank Car Corporation in the action referred to defended upon the sole ground that such payment would constitute an illegal rebate under the Elkins Act. There was no issue as to the legality of the contract or the amount of the mileage allowance, nor did the shipper lessee (Appellant here) make any claim against the carriers. The Commission did not determine as required under the provisions of Section 15 (13) of the Interstate Commerce Act what was a just and reasonable compensation to be paid in the future by the carriers to the furnishers of tank cars uniformly as a class. It deliberately avoided that subject with a statement that the investigation would be too greatly extended. Counsel assert that the Commission by its findings authoritatively fixed the reasonable amount of allowance payable to the shipper but decided it was without authority to enter orders directing the payment thereof either by the car company or by the carrier. Counsel also assert that the car company was not subject to the Commission's authority. If the Commission was without authority to require the car company to pay in accordance with its agreement the mileage received by it, it was equally without authority to release the car company from its obligations so to do under the agreement. Yet the effect of the Commission's findings and order was to deny to plaintiffs the right to recover under the lease contract and to permit the Tank Car Corporation to retain the mileage which it had collected from the carriers as mileage allowances for the tank car facilities furnished by the Appellants, as shippers, notwithstanding the provision of the statute that such allowances could be paid and was only authorized for the benefit of the furnishers of the facilities. On the basis of the claim of opposing counsel that the Commission "authoritatively fixed"

the amount of the allowance payable to the shipper, it would seem very clear that the Commission attempted to or did decide the assumpsit case pending in the District Court, of which case the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra*, held the District Court had jurisdiction. This was an unconstitutional assumption of authority on the part of the Commission and in excess of the authority conferred by Section 15 (13) of the Interstate Commerce Act. That condition presented a case or controversy that was reviewable by a Three Judge Court under the Urgent Deficiencies Act. (*Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156.) Any question as to whether there had been in the past a breach of the Elkins law or the Interstate Commerce Act or a failure to conform to the published tariffs, was a matter for the decision of the District Court before which the action in assumpsit was pending. It was not a question within the competence of the Commission. The distinction between the authority of the Commission on the one hand and that of the courts on the other, was clearly stated by the Supreme Court in its decision in the case of *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. The court there pointed out the difference between questions as to the force of a statute or the construction of a tariff, and questions as to technical matters involved in the framing of tariffs or rules. Questions of the first type were held to be subject to determination by the courts. The court further stated "To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function". The same court also held in *Ellis* v. *I. C. C.*, 273 U. S. 434, that the Commission is without authority over those who are not

carriers in the public service. This lends support to the theory of opposing counsel that the Commission was without authority over the Tank Car Corporation or the fulfillment of its obligations, but it also supports our contention that the Commission was without authority to relieve the Tank Car Corporation of its existing obligations.

On the basis of the claims of opposing counsel that the Supreme Court in its decision of *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra*, directed that the District Court should stay its hand until the Interstate Commerce Commission could decide certain questions and that the Commission in the findings and order under challenge had decided those questions, the District Court would naturally consider the findings of the Commission as binding and as stated by opposing counsel "authoritative", and render its decision in the assumpsit suit accordingly. Thus the authority of the court would have been exercised by the Commission. Counsel for Appellees argue however that the District Court may in a trial of the assumpsit action determine the propriety and validity of the Commission's order. In other words it may accept or annul the order of the Commission. It is a sound rule of statutory construction that where the statute provides for a review of an order by a particular court, as in this case, that authority is exclusive and denies a right of review by any other court or body. The case of *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, previously cited by Appellees' counsel declares no other rule. That case did not involve a question of review.

Counsel for Appellees also argue that the requisites of equity jurisdiction must exist to warrant review under the provisions of the Urgent Deficiencies Act. The statute under which this action was filed definitely provides that a court constituted of a Three-Judge Court shall have jurisdiction to enjoin, set aside, annul or suspend any

order of the Interstate Commerce Commission. The act provides for a statutory review. In the case of a "statutory review" the statute is the measure by which the jurisdiction should be determined. Since it is a review provided by statute for given orders, it is only necessary that the order sought to be reviewed be within the orders listed in the statute. Admittedly that is so in the instant case. Therefore, it is not necessary that all of the criteria of equity jurisdiction shall be established in the bill of complaint where as in this case the order (which embraced by reference the findings as well) was made by the Interstate Commerce Commission in its administrative capacity. The claim that the complainant, Appellant here, is not faced with any immediate threat of interference with its rights, would seem to be completely answered by the fact, admitted by opposing counsel, that the order of the Interstate Commerce Commission was an "authoritative decision" of the questions involved in the assumpsit case pending before the District Court. Whatever else may be said of the report and order under attack, and whether it is classed as ancillary to the civil action or quasi judicial, it effectively denied to the Appellants, as lessees of the tank cars, the right to recover the moneys to which they were entitled under the terms of the car lease agreement, and furthermore determined that what they had so received in the past under that agreement was improperly paid to them. They were therefore aggrieved in their property rights. This constituted a case or controversy within the jurisdiction of the Three-Judge Court under the Constitution and the Urgent Deficiencies Act. (*Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, and *Mitchell* v. *U. S.*, 313 U. S. 80.) We believe that the order of the Commission under challenge in the Lower Court was made in excess of the constitutional power of the Commission; that it was contrary to and in excess of the statutory authority

of the Commission and that the findings on the questions that were decided were not supported by any evidence before the Commission. The order was therefore subject to review by the Lower Court under the provisions of the Urgent Deficiencies Act and Appellees' motion to affirm should be denied.

Respectfully submitted,

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